

INDEPENDENT POLICE AUDITORS' REPORT

Review of Investigations Completed as of June 1, 2023

Presented to the Honorable City Council

City of Palo Alto

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Introduction

As we have for several years now, OIR Group publishes reports semiannually in Palo Alto for consideration by City Council and the general public. This Report covers six months of recent activity within the Palo Alto Police Department, across the designated range of categories that is subject to our review in our capacity as the City's Independent Police Auditor.¹

The goals of our work are straightforward: to offer increased transparency about processes that have long been primarily internal and confidential within policing, to increase the scrutiny of the Department's internal review processes from the perspective of an independent outsider, and offer recommendations where applicable with an eye toward strengthening PAPD performance in the future.

The IPA scope of responsibility in Palo Alto, as defined by the City Council in a way that has evolved over time, calls for evaluation of all Department investigations into alleged misconduct. The IPA is now also responsible to review select incidents involving use of force by officers – a grouping that includes all Taser cases, dog bites, and instances of significant injury or hospital treatment.

The pool of matters covered below is, as with our previous Report from earlier this year, is a relatively small one. Only one complaint investigation emerged during the relevant months. We also looked at one relatively straightforward use of force and one that was part of a more complicated incident – and ended up involving a vehicle pursuit with a car that crashed, followed by a foot pursuit and use of physical force.

For the second time, this Report also features a discussion about PAPD's administrative process with regard to the review of "pointed firearm" incidents. Public recognition of these events as a significant exercise of police authority has increased in recent years, and what was once treated as a routine tactic is now subject not only to policy limitations but to a new level of formal review.

As we mentioned in our last Report and describe below, the Department's process is still developing, and we note a couple of concerns and suggestions in the discussion that follows. Importantly, though, PAPD appears to be committed to smoothing the bumps in its protocol and achieving the goals of more rigorous evaluation.

¹OIR Group has served as Palo Alto's Independent Police Auditor since 2007. It is led by Michael Gennaco, a former federal prosecutor, and a nationally renowned authority on the civilian oversight of law enforcement. Its website, which includes past versions of its semi-annual reports on PAPD, is www.oirgroup.com.

In developing the summaries, analyses, and recommendations that follow, we benefitted from our full access to the underlying records associated with each case. The Department continues to be cooperative in providing us with the requisite reports and other evidence (including body-worn camera recordings), and it remains open to our feedback. We appreciate the opportunities to engage with PAPD and, ideally, contribute on behalf of the public to the enhancement of its operations.

External Complaint Investigations

Case 1: Third-Party Complaint about Failure To Properly Handle an Allegation of Sexual Assault

Factual Overview:

An adult male underwent two surgical procedures in the same Palo Alto hospital, several weeks apart. A few months later, he contacted PAPD to make a rape allegation that was based on his contention that he had been given a catheter without his consent during both hospital visits.

A supervisor spoke with him and took some investigative steps in relation to the man's report. The man eventually agreed to a release of his medical records, which included signed copies of the consent form to which he had agreed prior to both surgeries. Based on the language within the form, and on a consultation with the District Attorney's Office as to whether the conduct at issue was criminal in nature, the Department decided not to move forward with developing charges and making a formal submission for prosecution.

This was disappointing to the man, who energetically maintained that he was a crime victim and accused the supervisor and others of not doing their job. He expressed his frustration through communications with the initial supervisor and PAPD management that included references to possible legal action in response.

PAPD Investigation and Outcome

The Department decided to formalize the man's concerns and the PAPD analysis within a Supervisor Inquiry Investigation. It essentially recounted the history of the interactions with the complainant, and reached a conclusion that any misconduct allegations were "Unfounded."

IPA Review and Analysis

We concur with the finding that no violations of policy occurred. The initial supervisor had handled the man's report with appropriate due diligence, and PAPD took several additional steps to ensure that its interpretation of the facts was sound.

Use of Force Cases:

Case 1:

Factual Summary

This case involved officers' efforts to take a man into custody after he had allegedly assaulted employees without provocation upon entering a restaurant. The PAPD

involvement began when police received a call for service from employees at the restaurant, reporting that the subject had entered the restaurant, began yelling, and throwing furniture, and then assaulted two employees. The body-worn camera recording from the initial officer to arrive at the scene shows two employees holding a man down who is on his back.

The officer called for backup, and a number of additional officers arrived within seconds to assist. The officer rolled the subject onto his stomach, which resulted in the subject's hands being beneath him. After three additional officers arrived, the subject did not comply with instructions in both English and Spanish to put his hands behind his back so that he could be handcuffed. As a result, one officer reported delivering several punches to the subject's thigh, while a second officer reported delivering several knee strikes to the man's rib area. Eventually, the officers were able to roll the man onto his stomach and secure him with handcuffs. The subject suffered no visible injuries from PAPD's reported uses of force and declined medical attention.

PAPD Review:

The case went through the Department's supervisory review process, which utilizes a detailed template to ensure that relevant evidence is gathered and that compliance with policy is thoroughly evaluated. Here, the assigned supervisor showed due diligence in moving through the relevant investigative steps. These included review of body-worn camera recordings and reports, as well as interviews of the restaurant employees who were victims and witnesses to the earlier assaultive behavior.

The reviewing supervisor determined that the force was justified by the circumstances and consistent with policy. The supervisor found that the exigency of arriving to an incident in which the subject had reportedly just punched two employees made it impracticable to deploy de-escalation techniques other than the instructions given to the subject to place his hands behind his back.

IPA Review and Analysis:

We reviewed body-worn camera footage and reports from this incident, and we concur with the Department's finding that the force was an appropriate response to the subject's resistive behavior.

Vehicle Pursuit -- Pointed Firearm -- Foot Pursuit -- Use of Force

Factual Summary

This case began when officers were asked to respond to a reported retail theft at a local shopping center. The involved officer responded to the call and observed a female sitting in a vehicle in a nearby parking lot whom he suspected of being involved. He pulled behind her car. The subject then exited her car while talking on her cell phone. She spoke briefly to the officer before returning to her car and closing the door over the officer's objections. The officer unholstered his firearm as he moved toward the driver's side of the vehicle and pointed his gun at the woman. The officer then immediately backed away from the subject's vehicle as the subject placed her car in reverse, striking the patrol car. The subject then put her car in forward gear and drove over the curb and away from the location.

The officer pursued the subject while utilizing the lights and siren of his vehicle. After losing sight of the subject at one point, he reacquired her location and continued to pursue her. After approximately two minutes, the officer observed the subject's vehicle roll over. As he approached the subject, the officer again drew his weapon and pointed it at the woman. The woman ignored the officer's commands and began to run away. The officer ran after her and tackled her to the ground after a brief foot pursuit. Additional officers arrived and assisted in handcuffing the subject. Paramedics were called to the location and the subject was transported to a local hospital.

We were further advised that as a result of the incident, the involved officer received an injury to his wrist which caused him to be out of work for several weeks.

PAPD Review

The initial review focused on the vehicle pursuit. The reviewing supervisor concluded that the pursuit was within policy since the subject had just rammed the officer's car – an act which met the requisite "violent felony" standard that PAPD policy requires before a pursuit can be initiated. The supervisor further concluded that the pursuit was controlled and the direction of travel was appropriately called out by the officer. In evaluating the driving of the officer, the supervisor noted that the officer had failed to stop at a controlled intersection on one occasion and crossed the center line on another occasion to pass a box truck.

To his credit, the supervisor further noted that the officer had failed to include in his initial report that he had pointed his firearm at the subject at the initial stop. The supervisor

indicated he discussed with the officer the need to document that action and the officer had prepared a supplemental report documenting his decision to unholster his weapon and the rationale for doing so.

Finally, to the supervisor's additional credit, he noted that as the subject was being directed into a vehicle, the officer said: "It's not that hard to get into a fucking car." The supervisor said he reminded the officer of PAPD policy restricting the use of profanity and counseled him on its use. Department management's use of such "teachable moments" occasions for course correction is a practice we endorse.

IPA Review and Analysis

IPA was provided and reviewed the recordings from both the officer's in-car video system and his body-worn camera, the police reports, and the supervisory memorandum. As discussed below, we noted a few issues for further consideration.

The Vehicle Pursuit

PAPD's vehicle pursuit policy acknowledges that vehicle pursuits are one of the most dangerous enforcement actions an officer may be involved in. As a result, the policy sets out a series of detailed expectations for initiating and terminating a pursuit, as well as expectations that supervisors carefully review the incident to determine whether the policy requirements have been met.

As detailed above, the review of the vehicle pursuit was set out in a supervisory memorandum. However, in that memorandum, certain aspects of the pursuit were not fully documented. For example, PAPD's vehicle pursuit policy states that pursuing units should exercise due caution when proceeding through controlled intersections. The memorandum notes that the officer failed to stop at one controlled intersection. Yet a close review of the MAV ("dash-cam") footage shows that the officer failed to stop or slow through six controlled intersections.

The memorandum further notes that the officer crossed over to the opposite lane of a two-lane road in order to pass a large truck. The MAV footage, however, shows that it was actually *two* large trucks that were passed in the maneuver. The MAV footage also shows that later in the pursuit, the radio car again briefly crossed into the opposing lane.

The analysis of the pursuit suffers from the omission of important facts that were captured by the video equipment. While a more careful analysis may have still concluded that the pursuit was in policy, the failure of the supervisory memorandum to include all salient

facts – and to base any subsequent analysis on all those facts –undercuts the legitimacy of the Department’s bottom-line conclusion.²

Recommendation ONE :

PAPD should ensure that supervisors include all salient facts in their vehicle pursuit evaluations.

Foot Pursuit

Current PAPD policy advises officers that “the safety of department members and the public should be the primary consideration when determining whether a foot pursuit should be initiated or continued. Officers must be mindful that immediate apprehension of a suspect is rarely more important than the safety of the public and department members.”

The policy further requires officers involved in foot pursuits to complete the appropriate crime/arrest reports documenting, at minimum, the following:

- (a) The reason for initiating the foot pursuit.
- (b) The identity of involved personnel.
- (c) The course and approximate distance of the pursuit.
- (d) Whether a suspect was apprehended as well as the means and methods used.
 - 1. Any use of force shall be reported and documented in compliance with the Department Use of Force Policy.
- (e) Any injuries or property damage.

While in this case the initiating officer documented some of the above information in his police report, information such as the course and approximate distance of the pursuit was not specifically included. More critically, the foot pursuit sets out certain criteria an officer should consider in determining whether to initiate and continue a foot pursuit. In reviewing this incident, the supervising officer did not evaluate the officer’s actions to determine whether the officer’s actions were “reasonable” and followed the criteria set out in policy. There should have been an evaluation of the officer’s conduct and whether his actions complied with the Department’s foot pursuit policy, especially given the use of force that terminated the pursuit.

² The reader should not conclude that IPA found any intent to deceive as a result of the memorandum failing to include all salient facts.

Recommendation TWO:

The Department should expressly evaluate compliance with its foot pursuit policy, particularly when the end of the pursuit involves a use of force involving potential injury or pain to the subject.

The Use of Force

*The repeated pointing of the involved officer's firearm.*³ The supervisory memorandum appropriately notes that the pointing of the firearm at the initiation of the incident should have been documented, along with the rationale for doing so. However, the memorandum fails to note that the officer actually unholstered his firearm and pointed it at the subject on two separate occasions: first at the initiation of the contact and again after the subject's car rolled over and she got out of the car. To the officer's credit, he described both "pointing a firearm" incidents in his supplementary memorandum.

The tackling of the subject. There is no apparent PAPD review of the officer's admitted "tackling" of the subject, causing her to go to the ground – an action he reported to a supervisor on scene immediately after the incident. The body-worn camera recording shows that, at one point, the officer told a supervisor that he saw blood on the subject's hands after she went down but did not know if it occurred because of the tackle or the accident.

The officer then said it probably didn't occur from the tackle since they had landed on grass. There are no indicia that the subject was interviewed relating to the use of force.⁴ As a result, there is insufficient documentation of the take-down, which leaves a question as to whether a more formal force review process was needed per policy. That gap should have been closed.

Recommendation THREE:

PAPD should ensure that sufficient inquiry is made at the scene regarding any reported use of force to determine whether a more formal review is required.

³ We note here that PAPD does not technically categorize the pointing of a firearm as a "use of force" per the definitions of its policy manual. However, the Department has recently subjected this tactic to a greater degree of formal scrutiny, as discussed further below in the "Pointed Firearm" section of this Report.

⁴ If the subject had been interviewed and indicated that any injury or pain that she had received had been a result of the rollover accident, that would have dropped the physical contact at the end of the foot pursuit below the level of PAPD's process for the formal supervisory review of force.

Interviews of Witnesses

One civilian witness assisted the responding officer in controlling the subject until backup officers arrived. Another civilian witnessed the incident. According to the body-worn camera recording, the responding officers encountered the two individuals after the incident and asked if they had in fact been participants. When they replied affirmatively, the initially involved officer advised them that since he himself had been involved, it would be better for a non-involved officer to obtain their statements. The officer then creditably followed up with a supervisor and the civilians were interviewed by another officer. And the subject was also interviewed by non-involved officers about aspects of the incident.

These were noteworthy instances in which Department members showed a consciousness of best practices to ensure the objectivity of the review. As such, they deserve acknowledgement.

"Pointed Firearm" Incidents

As noted above, this is the second audit cycle that provided us with the opportunity to evaluate the Department's administrative handling of incidents in which officers point their firearms at a subject in the context of an enforcement encounter. PAPD reported five instances that fit the criteria, and gave us available materials, including police reports and relevant body-worn camera recordings.⁵ A new feature was also included for each case: a brief memo from a reviewing supervisor who had assessed the incident and evaluated the legitimacy of the involved officer's actions.

This supervisory memo is the product of the Department's evolving system for addressing these incidents with completeness, appropriate rigor, and efficiency. Our previous Report cited "growing pains" in this endeavor that were of two types. First was the need for more timely and accurate identification of these incidents when they occur, and second was the need for a further vision for developing and documenting a review process – one that effectively balanced meaningful accountability against new impositions on supervisory time and attention.

New mechanisms for ensuring the "capture" of relevant incidents have been implemented – and in fact led to the surfacing of an instance that was missed in 2022 and belatedly

⁵ A sixth incident was one element of a larger encounter that had several "reviewable" features, and which we discuss above.

reviewed for this cycle.⁶ We expect that ongoing refinements will enhance the identification process even further going forward.

As for the supervisor's memo, it constitutes a useful step in the right direction. While the initial examples have been quite brief, they constitute formal documentation of a purposeful assessment that itself is adding accountability in an arena that members of the public clearly care about. However, as discussed below, we questioned the *substance* of the evaluations in at least a couple of instances.

The context for the five deployments was as follows:

- Police received an early morning call from a grocery store employee regarding a young male subject who had allegedly brandished a firearm in the context of a dispute at a checkout register. Different officers responded to the area in an attempt to locate the subject. A responding supervisor encountered the person, who was walking in the neighborhood. Because of the reports that the subject was armed, the supervisor unholstered his duty weapon and pointed it at the subject while giving commands for him to get on his knees. The subject was initially non-compliant but was then taken into custody without further incident.
- Using a locator app, officers tracked the subject in a robbery/assault into a neighboring city and found him seated in a stolen vehicle. The male subject initially fled from officers. One officer trailed him, first in his radio car and then on foot. He eventually re-encountered the subject in a parking lot and ordered him at gun point to get on the ground. Though initially non-compliant, the subject was eventually taken into custody without further incident.
- In responding to the same call for service as the robbery/assault case above, a responding officer noted a second subject walking away at the stolen car location from which the first subject had fled. The officer continued to monitor the vehicle location, saw the second subject back in the car's vicinity, and pointed his firearm to gain compliance with commands for the person to get on the ground.
- Responding officers located a subject who was wanted in connection with a residential burglary that had just occurred. He was walking along a freeway onramp, and an officer who spotted him got out of his own vehicle and, using his car as cover, pointed his weapon in the man's general direction while giving commands. The man complied eventually and was arrested.
- Several officers responded to a broadcast regarding a reckless male driver who was involved in several hit and run collisions (and was eventually arrested for

⁶ To be clear, our sense is that any gaps have been a function of adapting to new expectations and clarifying definitional ambiguities, and not a matter of intentional evasion on the part of officers. And we reiterate a point from our last report: the very small number of apparent deployments reflects appropriate restraint on the part of PAPD personnel in the field.

being under the influence of drugs). One of the officers who found the subject and who used his radio car to block the subject's escape route briefly unholstered his weapon and pointed it in the man's general direction while giving initial commands.

Each of these tactical choices was found by PAPD to be consistent with policy and training, and we concurred with these "bottom line" conclusions. At the same time, we noted a couple of concerns.

First, in one case, the officer had simultaneously unholstered both his Taser and his firearm, and briefly pointed both at the subject while giving commands as the man approached. Because of the potential for "weapons confusion" and inadvertent trigger pull, this is considered tactically problematic, to the point where a specific admonitory reference is included in Department policy.

Here, the officer seemed very much in control, and he quickly and overtly holstered his gun so as to de-escalate the situation. In our view, though, the supervisor's memo should have – and did not – make note of the tactical misstep. This effort would not be for the sake of nitpicking or undermining the officer, but instead to constructively enhance future performance. This, along with accountability where appropriate, is an important way to make administrative review meaningful and worthwhile.

We also disagreed with a supervisor's assessment that a particular use of "terse and provocative language" was an effective factor in gaining the subject's compliance in conjunction with a pointed firearm. In our viewing of it, the subject was *already* cooperating – to the point of lying down on the sidewalk and extending his arms – when the officer punctuated an additional command with a particularly harsh profanity.

While flagging the issue at all was to the supervisor's credit, we reiterate a point we have made often: although there are indeed instances when understandable adrenaline or the desire to give a verbal "jolt" make officer profanity excusable, the bar would ideally be higher than what we saw (and heard) here.

Recommendation FOUR:

PAPD should encourage supervisors to treat the "pointed firearm" review process as an opportunity for holistic assessment of officer performance, and should document and address issues where relevant.

Recommendation FIVE:

PAPD should continue to scrutinize officer profanity and emphasize the limited nature of exceptions to the general prohibition.

On the whole, we consider PAPD's enhanced attention to the pointing of firearms as an important addition to its mechanisms for meaningful internal review. And the process, if imperfect, is already being refined in positive ways.